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The Law of Boundaries

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T H E S I S .

THE LAW OF BOUNDARIES.

WRITTEN FOR THE DEGREE OF MASTER OF LAWS.

B Y

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THE LAW OF BOUNDARIES .

In the early history of the human family, when mankind had not yet emerged from the darkness of ignorance; when the scanty inhabitants led a wandering warlike life; the question of boundary, as affecting the rights of individuals, was practically unknown.

In this primitive condition, man knew no restraint; he confined himself to no territory; he recognized no bounds, save those which nature had imposed upon him. To him, the vast expanse of mother earth, with its wonderful wealth of undeveloped resources, was as free and common to all as the air he breathed.

Gradually, however, as man became more civilized, he abandoned his roving life, and formed small settlements, whose limits, if defined at all, were marked by natural boundaries only. Communities, thus protected, would gener-

ally coalesce, either by consent or conquest, and thus an independent State or Kingdom would be formed. Under this form of government the feudal system developed and reached the height of its power. As property in land became more valuable, the question of boundary became more important; but it was not till the rise of individual ownership in lands that it became intimately identified with the rights of the individual.

To day, in our own country at least, where "every man is a sovereign", and where the value of land in many of our large cities may be estimated by the number of gold dollars which will be required to cover it, the question of boundary becomes one of vital importance, and one which effects the property interests of every member of the community.

The term boundary, in its technical sense, may be defined, as, "every seperation, natural or artificial, which marks the confines or line of division between two contiguous estates." (1) It has also been defined, as, "a legal imaginary line by which different parcels of land

(1) Bouviers Law Dict.;
Tyler on Boundaries, 1.

are divided".(1) In its wider meaning, boundary may be said to be a line or object indicating the limit or furthest extent of a State or Territory.

In whatever sense the term is used, the line of demarkation may be fluctuating or invisible, if the compass and extent of the property can be determined, it will be sufficient. Neither is it necessary that the property should be capable of being restrained within artificial bounds.

Boundaries are naturally divided into two great classes: natural and artificial. Natural boundaries are those which exist in the condition that nature has made them, and include the sea, rivers and other inland streams, lakes, ponds, highways, trees, rocks, etc.. Artificial monuments are such as are erected or placed upon the land by man, as stakes, fences, etc..

It is my purpose to take up and outline as fully as my time and the nature of my subject will permit the law of boundaries appertaining to these subjects.

T H E S E A:- By the civil law the sea shore ,like

(1) Watson v. Tift, 14 Barb., 221.

common to all mankind, and like the sea itself was subject exclusively to the law of nations.(1) By the common law of England the title to the sea shore and the soil under the sea was in the crown, and private ownership therein could only be acquired by grant from the sovereign .(2)

The common law doctrine has been adopted in this country with little, if any modification; and as a general rule a conveyance of land bounded by the sea extends only to ordinary high water mark.(3) "Usual" or "ordinary high water mark", has been defined to be the limit reached by the neap tides, that is, those tides which happen between full and change of moon, twice in every twenty four hours; (3) or it may be said to be "the average height of the water reached by the high tides during the year".

In this country, as in England, corporations or private persons may acquire ownership in the shore or soil under the sea; but their title must originally be derived from the State, and will always be subject to the inalien-

(1) Institutes, lib. II., tit. 1, p 1-5 .

(2) Hale's Treatise de Jure Maris, 5-12;
Martin v. Wadell, 16 Pet. (U. S.) 367.

(3) Wash. Real Prop. Vol. III.,
3 Kent's Com. 431;
Van Dolsen v. Mayor of New York, 17 Cent. Law Jour. 231

(4) Teschemacher v. Thompson, 79 Am. Dec., 151.

able right of the State to control and regulate navigation in the waters adjacent to the same. Neither can the land be so used as to materially interfere with the right of the public to use the surrounding waters as highways for commerce.

As early as 1686, the crown of England granted to the corporation of New York the ownership in and control over all the lands located around Manhattan Island, situated between high and low water mark.(1) In 1730 this grant was extended so as to include all land under the sea for a distance of 400 feet from low water mark.(2) These early grants have been ratified and confirmed by numerous legislative enactments since our independence. (3)

By virtue of the authority vested in it by the State legislature, the city of New York, through its Common Council, has made numerous grants of land to private individuals; but as the limits of the property conveyed are usually clearly defined in the instrument of conveyance, comparatively little litigation has arisen concerning the

(1) Dongan Charter, 1686.

(2) Montgomerie Charter, Jan. 15th, 1730.

(3) Laws of 1813, Chapt. 86;
I. N. Y. R. S. 8th Ed., p 633.

same.

The term "beech", in its legal signification, is synonymous with shore; and may be defined as, "the land which is alternately covered and left dry by the ordinary flux and reflux of the tides".(1) Here again the civil law differs from the common law,; for by the civil law, the shore included the land between low water mark and the highest winter flood.(2)

While the owner of land bordering on the sea, cannot properly claim the land below high water mark; (in absence of grant from the State) he has, nevertheless, certain rights which are appurtenant to and pass with the land, and which may be enjoyed regardless of where the true boundary line may be. Among these is the right of access to the water; the right of accretion; the right to sea weed cast upon his land; and in Conn. he has the right to wharf out if he does no injury to free navigation.(3)

In Massachusetts and Maine the boundary line of lands bordering on the sea is low water mark; but this

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- (1) Hall on the Sea Shore;
Comm. v. Roxbury, 9 Gray 492.
(2) Institutes, lib. II., tit., 1, p 1-5.
(3) Mather v. Chipman, 40 Conn. 382.

departure from the common law is due to an old colonial charter. (1) It must be remembered, however, that where the shore is the boundary, the line of demarkation is not necessarily a permanent one, but is subject to change as the sea recedes or advances.

N A V I G A B L E R I V E R S :- In determining the law of boundaries applicable to navigable rivers, a question of the utmost difficulty is presented. This difficulty arises, not so much out of the unsettled condition of the law of boundaries, as from the wide spread and irreconcilable conflict which has existed in this country as to what are technically navigable rivers.

The rule was well settled at common law that a navigable river was one in which the tide ebbed and flowed; and that the boundary line of lands owned by riparian proprietors, bordering upon the same, was high water mark. By the civil law the test of a navigable river was its ability to subserve the purposes of navigation.

Many of the States, although regarding all rivers that were navigable in fact as public highways, made the

(1) Colonial Ordinance, 1647, Anc. Charter, 148, ## 2-4; Dillingham v. Roberts, 75 Me. 469.

ebb and flow of the tide the sole test for determining the boundary line of lands bordering on such rivers.

On the other hand a large number of the States repudiated the common law doctrine, regarding it as unsuited to the large fresh water rivers of this country, and adopted the test of the civil law.

While it would be impossible to harmonize these radically different doctrines, the following classification, made with special reference to the law of boundaries, will be beneficial and may be regarded as embodying substantially the American law upon this subject.

1. The boundary line of lands owned by riparian proprietors bordering upon rivers in which the tide ebbs and flows is high water mark.

2. The boundary line of lands bordering upon rivers in which the tide does not ebb and flow, but which are in fact used for the purposes of navigation, depends entirely upon the jurisdiction in which the river is situated

- (a) The following States(see note (1),page 9)in conformity with the common law doctrine, hold that the boundary line of lands owned by private individuals, bordering upon such streams is the *filum aquae* or thread of the stream.

In a few of the States where the common law rule prevails, an exception is made in the case of lands bordering on rivers of such magnitude as the Mississippi and Ohio where it is held that the boundary line is low water mark. (2)

(b) The following States, (see note (3)) hold that

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- (1) Me. Browne v. Chadburne, 31 Me. 9;
 Robinson v. White, 42 Me. 209;
 N. H. State v. Boscowen, 28 N. H. 193;
 Vt. Newton v. Eddy, 23 Vt. 319;
 Fletcher v. Phelps, 28 Vt. 257;
 Mass. Comm. v. Alger, 7 Cush. 53;
 Bardwell v. Ames, 22 Pick. 333;
 Conn. Chapman v. Kimball, 9 Conn. 38;
 Ohio. June v. Purull, 36 Ohio St. 396;
 Ill. Seamen v. Smith, 24 Ill. 523;
 Piper v. Connelly, 108 Ill. 646;
 But see Trustees v. Schall, 120 Ill. 509;
 Mich. Backus v. Detroit, 39 Mich. 110;
 City of Grand Rapids v. Powers, 45 A. L. J. 148;
 Mo. Primm v. Walker, 38 Mo. 99;
 Miss. Magnolia v. Marshall, 39 Miss. 109;
 N. J. Atty. Gen. V. R. R. Co. 27 N. J. Eq. 1;
 Md. Goodsell v. Lawson, 42 Md. 348;
 S. C. State v. Columbia, 27 S. C. 137;
 Ga. Stanford v. Mangin, 30 Ga. 355;
- (2) Ensimer v. People, 49 Ill. 172;
 Martin v. Evansville, 32 Ind. 85.
- (3) Pa. Corson v. Blazer, 2 Binn. 475;
 Poor v. Mc Clure, 77 Pa. St. 214;
 Iowa. Haughton v. R. R. Co. 47 Iowa 370;
 Wisc. Diedrich v. R. R. Co. ,42 Wisc. 248;
 Tenn. Goodern v. Thompson, 54 Am. Rep. 410;
 Fla. Buchit v. Cone, 6 So. Rep. 160;
 Ala. Sullivan v. Spotswood, 2 So. Rep. 716;
 Kan. Wood v. Flower, 26 Kan. 689.

the boundary line of lands bordering on such streams is high water mark. In a few of the States this question has never arisen, and in Indiana and Kentucky the courts have decided both ways.(1)

By the decisions of the Supreme Court of the United States, patents by the United States of lands bordering on streams and other waters are to be construed according to the law of the State in which the land is located.(2) It, therefore, becomes of the utmost importance to know the law of the particular State in which this question arises.

In *Magnolia v. Marshall*(3) this question is learnedly discussed, and the authorities carefully reviewed.

Tiedeman's suggestion in this connection is also worthy of notice.(4)

Rule in New York:- The earlier decisions in this State evinced a strong tendency to absorb the common law doctrine as to navigable rivers in toto; and as a result, many absurdities and inconsistencies have been introduced into the law of boundaries in this State.

(1) *Dawson v. James*, 64 Ind. 162;
Bruce v. Taylor, 2 J. J. Marsh, 160.

(2) *Barney v. Keokuk*, 94 U. S. 324;
Hardin v. Jordon, 11 Supr. Ct. Rep. 808.

(3) 39 Miss. 109.

(4) *Tied. Real Prop.* #835.

Following these early decisions came a period of reaction in which the courts, including some of our most eminent jurists endeavored to break away from the fallacy into which the early courts had fallen. The old common law, however, had made so deep an impression upon our jurisprudence, that this result was not entirely accomplished; but many qualifications and restrictions have recently been made.

The New York rule may be briefly stated, as follows:

1. All rivers and streams which are capable of being used for the purposes of navigation are navigable.

2. The boundary line of lands bordering on such streams is not determined by the navigability of the stream but by the ebb and flow of the tide.

- (a) In all streams in which the tide ebbs and flows, the boundary line is high water mark. Title to the bed and shore are in the State, subject to the public right of navigation, over which the State may exercise its authority which is inalienable.

- (b) In navigable streams in which the tide does not ebb and flow, the boundary line is the *filum aquae* or thread of the stream; but, nevertheless, such streams are

public highways, and like those of the first class, (a) the public cannot be prevented from using the same for carrying on trade and commerce.

The preceding rule does not apply to the Hudson and Mohawk rivers, the reason assigned being, that the original riparian proprietors took by grant from Netherlands where the doctrine of the civil law prevailed. When the English acquired control over New York, they only guaranteed to the colonial settlers the same rights and privileges which had been accorded them under the sovereignty of Netherlands, and for this reason the title to the soil under these rivers remained in the State.

The courts are disposed to restrict this doctrine to streams wholly within the State and the above rule does not apply to the Niagara, or St Lawrence rivers, though the tide does not ebb and flow in these waters.

The following are the principal New York cases which have arisen involving this question. (1)

(1) People v. Platt, 17 John. 195; Hooker v. Cummings, 20 John. 90; Roger v. Jones, 5 Wend. 237; Commrs. v. Kempshall, 26 Wend 404; Ex Parte Jennings, 6 Cowen 518; Gould v. H. R. R. Co. 6N. Y. 522; People v. Canals Apprs., 33 N. Y. 461; Trustees v. Strong, 60 N. Y. 56; Smith v. Rochester, 92 N. Y. 463; Bedlow v. Dock Co., 112 N. Y. 263; 83 N. Y. 178; 19N. Y. 523; 110 N. Y. 380.

N O N-N A V I G A B L E S T R E A M S :- Non-navigable streams may properly be defined as, "those which are not used or susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on the water".(1)

The rule in regard to such streams is entirely uniform,; and the boundary line of lands bordering on such streams is the *filum aquae* or thread of the stream. The term *filum aquae* is defined by Washburne as, "the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water, at its medium height, neither swollen by freshets or shrunk by droughts".(2)

L A K E S A N D P O N D S :- Here, as in fresh water navigable streams, we are met with much conflict of authority. Had the various States followed logically the rule adopted by them in regard to rivers and other streams, adhering either to the rule of the common law or to the civil law doctrine, little difficulty would be experienced

(1) The *Daniel Ball*, 10 Wall. 557;
The *Genesee Chief*, 12 How. 454.

(2) Wash. Real Prop. Vol. III., Chapt. II., # 4

in determining the boundary line of lands bordering on lakes and ponds. That such a course has not been taken by the different States, is very evident from a careful study of the various authorities.

In most of the Eastern States where the common law doctrine regarding boundaries upon fresh water streams was implicitly followed, the common law rule concerning lakes and ponds has been entirely disregarded. In these States the courts hold that grants of land bordering upon lakes and ponds extend only to low water mark.(1)

The reason for this radical departure from the common law has been partly due to an early colonial ordinance which provided that the title to all lakes and ponds containing more than ten acres should be in the State.(2) Other States though not passing statutes upon this subject followed the lead of Massachusetts by judicial decisions promulgating the same rule.(3)

On the other hand we find many of the States holding that the title to the soil under lakes and ponds is

(1) Mass. Paine V. Woods, 108 Mass. 160; (2) Anc. Ch. 1647.
 Me. Robinson V. White, 42 Me. 209;
 N. H. State V. Company, 49 N. H. 240;
 Vt. Austin V. R. R. Co., 45 Vt. 218;
 (3) Angel on W. C. # 41; Wash. Reap Prop. Vol. 111. 443.

in the riparian proprietors, and that the center of the same is the boundary line.

Though this construction has been much criticized , and is subject to many and valid objections, it has recently been approved by the Supreme Court of the United States; (1) and may be regarded as settled law in Ohio, New Jersey and Illinois; (2) while in Michigan and Indiana this rule has been adopted with slight modification.(3)

The great difficulty in the practical application of this rule is, that in lakes and ponds there is ordinarily no *filum aquæ*, and where the body of water is irregular in outline and more or less circular in form, it is almost impossible to locate definitely the dividing line between different riparian proprietors owning land bordering on such water.(4)

The rule in New York was apparently well settled until the decision of *Smith v. Rochester*;(5) but it appears

(1) *Hardin v. Jordon*, 11 Supr. Ct. Rep. 808.

(2) *Lambeck v. Nye*, 47 Ohio St. 248;
Cobb v. Davenport, 33N. J. L. 223;

(3) *Clute v. Fisher*, 65 Mich. 48;
Ridgeway v. Ludlow, 58 Ind. 248.

(4) *Indiana v. Milk*, 11 Fed. Rep. 309.

(5) 92 N. Y. 463.

from the holding in this case that New York is now placed among the doubtful States. The question of boundary was not directly involved in this case; nevertheless, the court admittedly unsupported by any precedent and entirely ignoring the case of *Wheeler v. Spinola*, (1) held that the title to lands owned by riparian proprietors bordering upon inland lakes and ponds extends to the center of the same.

The decision in this case, however, has been recently commented upon by the Supreme Court of this State, in the case of *Gouverneur v. Nat. Ice Co.*, (2) where the court said:- "The case of *Smith v. Rochester* depended upon so many questions and considerations not involved in *Wheeler v. Spinola*, and this latter case was not referred to, the inference is that the court did not intend to make any departure from the law as there laid down."

If a similar construction is placed upon this case by the higher courts, as seems very propable, *Wheeler v. Spinola* and earlier decisions may still be regarded as sound law in this State. (3)

In the case of artificial lakes and ponds a differ-

V

(1) 54 N. Y.

(2) 11 N. Y. Supp., 87.

(3)

ent rule prevails, and in absence of a clearly expressed intent to the contrary, a conveyance of land bounded upon an artificial body of water will extend to the center of the same.(1) In regard to our large inland lakes the courts of the different States are entirely uniform in holding, that in the absence of grant from the State, private ownership of land under such bodies of water cannot exist. The reason for this is obvious: it would be incompatible with the dignity of the State to relinquish the control over waters which are properly international, and in which ownership by private individuals would prove rather detrimental than otherwise.

H I G H W A Y S :- It may be regarded as an almost universal rule of law, that in the absence of express stipulation or clear intent to the contrary, a grant of land bounded by a public highway extends to the center of the same.(2) This presumption is allowed to prevail on the theory that when the road was originally built the proprietors on either side each contributed a portion of his land for this purpose. This rule is also supported by a sound

(1) Wheeler v. Spinola, 54 N. Y.

(2) Helmer v. Castle, 109 Ill. 664;
Transue v. Sell, 105 Pa. St. 684;
Peck v. Denniston, 121 Mass. 17;

D Dunham v. Williams, 37 N. Y. 251; 128 N. Y. 253.

public policy which discourages the inconvenience and impropriety of having so small and narrow a strip of land the subject of distinct and separate ownership.

This rule is not only applicable to country thoroughfares, but it applies with equal force to the streets of most of our cities.(1) An exception to this rule, however, is found in conveyances bounding upon the streets of New York. By laws of 1873 the municipal corporation, the city of New York, became the owner of all lands included in the streets of N. Y..(2) For this reason grants of land bounding upon the streets of New York City extend only to the edge or boundary line of the street. Such will also be the rule in regard to an ordinary highway when the language of the conveyance clearly indicates that a reservation of the highway was intended. But what language will be sufficient to establish such intent is the point of difficulty upon which the courts have differed. In some courts a rather strict construction is placed upon the terms of the grant, and in others a liberal one is allowed. It is

(1) Sherman v. Mc Keon, 38 N. Y. 266;
Kings Co. Fire Ins. Co. v. Stevens, 87 N. Y. 287;
Serry v. "L" R. R. Co., 122 N. Y.
(2) People v. Kerr, 27 N. Y. 188.

impossible to lay down any technical rule which will adopt itself to every case that may arise; and each case must be governed largely by the particular circumstances that surround it.

Other general rules of construction, relating to boundaries upon highways, will be spoken of in connection with another subject.

T R E E S , R O C K S , E T C .:- Trees are natural monuments, easily marked and identified, and are, therefore much used for indicating the boundary line between adjacent proprietors. In absence of express words to the contrary, the center of the tree is regarded as the dividing line; and a description extending to a specified tree carries title to the center of the same. IN such a case the adjacent proprietors are tenants in common of the tree; and neither can destroy the same without the consent of the other.(1)

If, however, the clear intention of the parties seems to be that the dividing line shall be wholly on one side of the tree, as where the deed calls for certain lands

(1) Hoofman v. Armstrong, 48 N. Y. 201;
Dubois v. Beaver, 25 N. Y. 123;

extending only to the North side of a certain tree, the intent will govern;(1) and in such a case the party on whose land the tree stands is entitled to any fruit which may grow thereon, and cannot be prevented from gathering the same, though the branches project over the land, and the roots extend into the soil of another. According to the old authorities, the adjacent owner may lop off such roots or branches, though the tree is thereby injured or destroyed.(2) But the better rule is for the aggrieved party to bring an action for nuisance, and thus compel the removal of the same.(3)

In the case of rocks, etc ., the general rules which have already been given apply, and no further discussion of these subjects will, therefore, be necessary.

A R T I F I C I A L M O N U M E N T S : Artificial monuments are those which are erected by man and placed upon the land to indicate the line of demarkation between two adjoining estates. They are generally of a less permanent character than natural monuments, and can be

(1) Stewart v. Patrick, 68 N. Y. 450;
 (2) Wash. Real Prop. Vol. 1.? p 11-12;
 (3) Arken v. Ketchum, 39 Barb. 400;
 Skinner v. Wilder, 38 Vt. 118;
 Davis v. Williams, 16 Queens Bench, 556.

more easily removed or destroyed. For this reason they are not regarded as of so high authority in marking boundaries as natural monuments.

Artificial monuments may consist of stones, stakes, fences, or any object or mark which serves to point out or designate the boundary line. They are usually made at the time of the original survey, but may be made at any time subsequent, if made under proper authority or by the consent of the interested parties.

Stakes, stones and other similar objects, are employed very extensively by government surveyors to aid in locating the boundary line between different tracts of land. The size, shape and kind of monuments to be used, are prescribed by the government; and a person familiar with surveying can readily determine the location and relative position of different tracts of land by examining such artificial monuments.

"Fences", says Taylor, "are sometimes defined boundaries, for the division of property, but they are more properly treated in law as guards against intrusion." (1)

(1) Tyler on Boundaries,

While this is true, it is also true that fences are very generally used to indicate the boundary line between different estates, and that if the location of a division fence is acquiesced in for a sufficient length of time it becomes binding upon the parties and serves to establish the division line in conformity with the location of such fence.

At common law one must build a division, or line fence as it is usually called, to restrain his cattle from encroaching or trespassing upon the land of an adjoining proprietor; but he need not in any case fence against intrusion from the cattle of another.

The rule of the common law has been adopted in this country, only so far as it is applicable to our different condition of society, and the greater extent of our territory. In many of the States statutes have been passed regulating this subject. In New York provisions are made for the settlement of disputes between adjoining land owners, concerning their division fences, by submitting such disputes to a special tribunal, known as Fence Viewers. Fence Viewers are also authorized to provide for the proper erection and maintenance of line fences, and to see

that the terms and conditions imposed by the statutes are properly complied with. (I)

B O U N D A R I E S H O W D E T E R M I N E D :-

Originally, the title to most land in this country was acquired, either by grant from the sovereign, or by purchase or conquest from the Indians. Surveys at this early day were more or less imperfect; and the line of demarkation between different estates was somewhat indefinite. So to, the terms used in the instrument of conveyance were vague and uncertain. As the number of inhabitants increased land became more valuable; and the large tracts were gradually broken up into smaller ones, whose boundaries were more correctly determined.

Agreements concerning boundaries were usually reduced to writing, and incorporated into the deed or instrument of conveyance. If the same property was subsequently conveyed, similar descriptions were employed, or reference was made to the original deed or survey. In this manner the language used in the deed describing the premises conveyed, became one of the principal means of ascertaining

the boundary line between different estates

When the language employed in the instrument of conveyance is clear and unequivocal, little difficulty will be experienced in arriving at the intention of the parties; but where the language used is uncertain, ambiguous, or inconsistent, the courts will frequently be called upon to render assistance in interpreting the meaning of the language used.

To accomplish this result certain well recognized principles or rules of construction have been adopted by the courts. Among the rules which are more particularly applicable to the law of boundaries, are the following:-

1. Monuments control courses and distances, and, likewise, all other measurements. (I) The reason for this rule is obvious. Courses and distances are merely descriptive of the facts; while monuments are actual visible objects indicating the extent of the land and the direction of its boundary lines. The accuracy of the first depends upon the skill of the surveyor, and the condition of his instruments while in the case of monuments, there is no opportunity

(I) Beal v. Gordon, 55 Me 482;
 Morrse v. Rogers, 118 Mass. 572;
 Piper v. Connelly, 109 Ill. 646.

for variance, as they always extend in the same direction, and are always the same distance from each other.

Among monuments, natural ones takes preference over artificial ones. Artificial monuments may or may not be in existence at the time of the transfer; but if they are subsequently erected and agreed upon by the parties, they will be binding and will ordinarily control courses and distances. (1)

Though the general rule is as stated, it is not an inflexible one, and calls for monuments which are repugnant to the whole description, will be rejected. (2) Thus where metes and bounds are represented by visible marked lines, they cannot be extended, though monuments are called for beyond. (3)

2. In the absence of monuments, courses and distances control. (4) As between courses and distances, courses usually prevail; though regard must always be had for the intention of the parties. If the boundary line is described

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- (1) Corning v. Troy Co., 40 N. Y. 208;
Hathaway v. Evans, 108 Mass., 270.
- (2) Swift v. Lee, 65 ILL. 336;
White v. Lunning, 93 U. S. 515;
Higginbotham v. Stoddard, 72 N. Y. 94.
- (3) Tyler on Bounds.
- (4) R. R. Co. v. Dyrer, 49 Vt. 74; Drew v. Swift, 46 N.Y.
Wilson v. Hildrith, 118 Mass., 578.

as extending from one natural object to another, or from a given point to a natural monument, as a highway or river, a straight line is meant; and in the latter case, the boundary line will always extend at right angles to the stream or highway at the point of its intersection with the same.

(1)

3. Quantity is the least certain of any call. Even though the words "no more" are used after the number of acres specified in the deed, this will not be sufficient to control calls for monuments clearly defined and indicated. (2) Quantity, therefore, is only useful where no other calls are given, or if given, where they cannot be ascertained.

The above general rules of construction might be supplemented by an almost unlimited number of particular ones; but as the subject of construction is not properly a part of my theme, I will only refer to a few of the most prominent.

When the term bank, side, margin, edge or shore is used, in describing a conveyance of land bounding upon a

-
- (1) Van Gorden v. Jackson, 5 Johns. 474;
Bradley v. Wilson, 58 Me. 360.
(2) Thayer v. Finton, 108 N. Y. 324;
Collingwood v. Parr, 93 Ill. 231.

river or other stream of water, the courts have generally held that no part of the bed of such stream passes to the grantee; but that the boundary line will be high or low water mark, accordingly as the river is navigable or non-navigable.(1) So the word side, margin, or edge have been held to exclude the street; thus a description beginning at a point on the South side of a road,.....thence along the same, will not include any part of the road.(2)

Ordinarily, land described as extending in a certain direction up, or down a river will be held to extend to the center of the river; but where the stream is small, as an ordinary brook, the courses will control rather than the line of the stream.(3)

The terms "to the river", "by the river", "with the river", or "along the river", are frequently used in describing land, and in absence of clear intent to the contrary, the filum aquae or thread of the stream will be regarded as the boundary line.(4) But where a creek was

(1) Rockwell v. Baldwin, 53 Ill. 19; (4) Vanburen v. Baker, Bradford v. Cressey, 45 Me. 9; 12 N. Y. S. R. 209; Halsey v. Mc Cormick, 13 N. Y. 296; Wash. R. Prop. Sibley v. Holden, 10 Pick., 249; Tyler on Bounds. Seneca v. Knight, 23 N. Y. 498.
 (2) Kings Co. Fire Ins. Co. v. Stevens, 87 N. Y. 287.
 (3) Winthrop v. Gurtis, 3 Greenl. 110.

bounded on the West side by a creek with high and precipitous sides, it was held that the description did not include any part of the water, or the right to use the same. (1)

"By or along the beech", includes the land only to high water mark. (2)

The words to, from, or by, and other words of similar import, in their ordinary signification, are words of exclusion; but as may be seen by the above examples, the nature of the subject matter may be such that, by necessary or usual implication, a different construction will be placed upon them.

The following rule, formulated in an early Massachusetts case, is undoubtedly the best one that can be given upon this subject; and will be of material assistance in this connection:- "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land in which it has been made a part,

(1) Hall v. Water Co., 103 N. Y. 129.

(2) Trustees of East Hampton v. Kirk, 68 N. Y. 459.

as a house, a wall, a wharf, the side of the structure referred to as the boundary is the limit of the grant; but where the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its nature or description include the earth as far down as the grantee owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a tree or stake, the center of the thing so running over or standing on the land is the line of boundary of the lot granted." (I)

S U R V E Y S :- Surveys are in many instances the original means whereby the boundary line between different estates is definitely located; and they are not only referred to in the instrument of conveyance. Under our present Public Land System, surveys are indispensable, and a knowledge of the general principles which govern the same is necessary to the successful practitioner in many of the States of this country. As this subject is so intimately connected with the law of boundaries as to be almost inseparable from it, I will briefly state the

general method upon which government surveys are conducted.

The first step is to determine the initial point, or place of beginning. This is usually located at some central point, from which observations can be conducted most advantageously. After the initial point is determined, lines are run East and West and marked at each half mile with a quarter section corner, and at each mile with a section corner. The line passing through the initial point is then extended North and South, and lines, called standard parallels, are run parallel with the same. These lines vary in distance from each other according to the latitude. In the northern States they are usually either twenty four miles apart or some multiple of twenty four; and in the States farther South some multiple of thirty is generally used. Other lines are then run East and West six miles apart; and also North and South a like distance from each other. The area included between the intersection of these adjacent lines is called a township. Townships are numbered North and South from the principal base. A series or tier of townships is called a range. These are numbered East and West from the principal meridian; the first tier of townships East being range one East, and the first tier

of townships West being range one West, etc. Townships are divided into sections, and these in turn are subdivided into half and quarter sections. The location of any particular tract of land is indicated by referring to the different points of the compass. These surveys are of material assistance, and little difficulty will be experienced in ascertaining the true boundary line between different tracts of land located within the territory where they have been made.

Where a plat or survey is referred to in a deed, it may be properly regarded as a part of the description, and construed in connection with the whole instrument.

Maps are usually the results of surveys and are governed by the same rules. In both the case of maps and surveys it must clearly appear that they have been made under competent authority, and have been taken from the proper custody.

P R A C T I C A L L O C A T I O N :- Disputes between adjoining owners concerning the practical location of their boundary lines, have been the source of much litigation in recent years. It is, however, well settled by the weight of authority that only in cases where the

boundary line is actually uncertain and subject to dispute, will a practical location of the same control unless acquiesced in for more than twenty years, or mutually agreed upon by the parties. The rule upon this subject has been thus concisely stated : (I) "Where the description of the premises in a deed is definite, certain and unambiguous, no extrinsic evidence is admissible to show a different location, unless possession be shown under claim of title for such a length of time as to bar a recovery in ejectment. If, however, the description is vague, obscure or ambiguous, or the monuments referred to have become decayed or destroyed, such evidence is admissible in aid of the deed. Practical location of the boundary line may be inferred by agreement, by long acquiescence, or by acts and declarations of the parties.

A G R E E M E N T :- Here, also, the true location of the boundary line must be unknown, or at least uncertain, in order that a valid agreement concerning the same may be made and enforced. There has been much controversy among the courts of different jurisdictions as to whether such an agreement respecting disputed boundaries were within the statute of frauds; but the better and generally prevail

ing rule seems to be that they are not. "To bring an agreement in respect to lands under the statute of frauds, it must in effect create, grant or assign, surrender or declare some interest or estate in lands other than a lease for a term of one year," is claimed that such an agreement does not effect the title to the land, but merely defines and determines the line of separation between two estates. On the other hand it is asserted that unless the true division line is decided upon, some portion of one party's land will in effect be conveyed to another. This is true, but by allowing the presumption that the line agreed upon is the true one, this difficulty will be disposed of. Further this rule seems to be supported by a sound public policy which tends to encourage the settlement of such disputes by friendly means, rather than by resorting to the courts.

(I)

An oral agreement to change a boundary line which has been established for more than twenty years, is not in itself sufficient to change the possession, and may be revoked at any time before the boundary line is removed. (2)

(1) Fosburg v. Teater, 32 N. Y. 561.

(2) Dunham v. Stuyvesant, 11 Johns 569.

Such an agreement made under a mistake of facts is not binding, if promptly rescinded upon discovering such mistake.

(1) It has also been held that if the line fixed upon by agreement can be shown not to be the true line, it will not be binding unless acquiesced in for twenty years. (2) This may perhaps be regarded as extreme doctrine, and somewhat questionable law in a few of the States; but notwithstanding this fact, if the mistake was originally due to the fault of the surveyor, agreements concerning such erroneous boundary line will not be enforceable. The doctrine of estoppel is frequently involved in cases of this nature, and is by no means an insignificant element in settling disputed boundary lines. A party though not entering into any express agreement concerning the boundary line may yet be estopped from denying that the existing line is the true one, if by his acts or omissions he has lead the other party to act or to refrain from acting to his detriment. Thus if a party knowing where the true boundary line is, permits the adjoining owner to clear up and improve his land beyond this line, or otherwise make costly improve-

(1) Coon v. Smith, 29 N. Y. 362.

(2) Liverpool Wharf Co. v. Prescott, 7 Allen 494.

ments under a mistaken impression as to the true location of the boundary line, he will ^{not} thereafter be allowed to show that it is elsewhere. So in cases of fraud or misrepresentation, where the other party has been led thereby to incur expense, the same rule applies. But where both parties are equally innocent, neither will be estopped from claiming to the true boundary line, though the other has erected a division fence in the wrong place and made improvements up to the same. (I) Neither will mere silent acquiescence, in absence of knowledge as to the true location of the boundary line, be sufficient to preclude a party from maintaining an action of ejectment to oust a party who has been in possession of land beyond the true line, and who claims by virtue of a division fence which both parties knew to be in existence.

A D V E R S E P O S S E S S I O N :- A division fence which has been maintained in one place continuously for a period of twenty years becomes binding upon the parties, and no evidence will be allowed to be introduced showing that the line is elsewhere. This is true, in the case of adjoining proprietors, though the possession is

(I) Raynor v. Timerson, 54 N. Y. 639;
Schraeder Mining & Mfg. Co., v. Packer, 129 U. S. 639.

not of such a nature as to constitute technical adverse possession. Thus mere silent acquiescence in the location of a boundary line for twenty years is sufficient to bar a recovery. (1)

The necessary elements to constitute adverse possession proper are well understood and need not here be mentioned. The general rules applicable to adverse possession proper also apply to boundaries, unless they have been superseded by special statutory provisions. (2)

A C T I O N S A T L A W :- In absence of statutes regulating the method of procedure, the usual way of settling disputed boundaries is by an action of ejectment to determine the title to the land in dispute. It can hardly be regarded as action to settle the true boundary line, though this result follows as incidental to the determination of the main issue. The judgement must set out the land in dispute by metes and bounds, and thus the disputed boundary line is definitely settled.

Another method of reaching the same result is by an ^{(action} for trespass. This action is seldom resorted to at the present time, owing to the more expeditious method which has

(1) Fisher v. Bennehoff, 121 Ill. 426.

(2) Code Civ. Pro., §§ 370-372.

superseded it under our modern practice.

I N E Q U I T Y :- In the case of boundaries, as in other subject matter over which equity exercises jurisdiction, the basis on which the court takes cognizance is the inadequacy of the legal remedy; and it is a well established rule that there must be some equity existing between the immediate parties to the action. Ordinarily this must arise out of something other than a mere dispute in regard to the location of the boundary line.

In the case of Perry v. Pratt(I) the court said:-

"The right to issue a commission to ascertain boundaries is necessarily limited by the rule that equity will not interfere where there is an adequate remedy at law. It is, therefore, confined to cases where there is some peculiar equity attached to the controversy respecting the lost bounds, arising out of the fraudulent or negligent misconduct of the respondent; where it is his duty to preserve the boundaries and they cannot otherwise be found or restored; to cases where a resort to equity is necessary to prevent a multiplicity of suits; and to cases where the power is necessarily exercised incidentally in the furtherance of another equity." So it has been held that the

(I) 31 Conn. 433.

question of title must be involved or equity will not assume jurisdiction. So in boundary cases in which the plaintiff is entitled to an injunction, the court of equity will give relief. Thus where the defendant threatened to take down and remove a part of plaintiff's house, which he claimed extended over upon his premises ; and it was claimed that the damage resulting would be irreparable at law, equity assumed jurisdiction and granted an injunction and thereafter a commission was appointed to ascertain and settle the disputed boundaries.(1) So, also, in the case of landlord and tenant, the court of equity will frequently take cognizance of the case and adjust the peculiar equities arising between the parties.

E V I D E N C E :- The rules relating to the admissibility of evidence in boundary cases are much more liberal than in ordinary cases. As a general rule it may be said that "every kind of evidence which is admissible to establish any other fact is admissible to prove or establish a boundary line."

The instrument of conveyance, if any, is the primary source from which a knowledge of the boundary line is to be ascertained; and in this as in other written instruments

(1) De Veney v. Gallagher, 20 N. J. Eq. 33.

no evidence will be admitted to change or vary the terms therein contained. But parol evidence is admissible for the purpose of explaining and removing latent ambiguities. Thus, where monuments are referred to in a deed, evidence may be given to show their location, and in the case of calls for different monuments, to show which one is intended. So parol evidence may be given to explain the meaning of technical, or unusual terms; but no evidence can be given to show a different intention from that clearly expressed in the instrument of conveyance. Parol evidence is also admissible to show the location of a boundary line as established by agreement between adjoining land owners.

(I)

Where the record of a survey is referred to, evidence may be given to explain the meaning of lines and marks appearing in the same; but only the party who made or participated in the original survey is competent to testify to the same. So public maps of recognized authority, which are under proper custody, are admissible; but private maps and surveys, as a general rule, are not. As in the case of surveys, maps referred to in a deed, are regarded as a part

(I) Shutz v. Sweeney, 26 N. E. (Ill.) 648.

of the deed and are entitled to equal weight. In the case of a discrepancy between a map and a survey, the latter will control. (1)

At common law declarations were not admissible, even in boundary cases, unless they were part of the *res gestae*; and this is still the rule in many of the States. According to these authorities, such declarations must be made by persons since deceased, while in the act of pointing out the boundary line, and while in actual possession of the land.(2) Some States, however, hold that such declarations need not be made while in the act of pointing out the boundary line.(3) Neither is it necessary in some States that the declarant should have been in possession at the time.

In the case of ancient deeds, evidence as to the usage in recent times is admissible when the lapse of time has been so great as to render it difficult to prove a boundary line by the existence of positive evidence. So evidence may be given showing a general custom or immemorial usage. This is more frequently resorted to in England

(1) *Whiting v. Gardener*, 22 Pac. 71.
 (2) *Lang v. Colton*, 114 Mass. 414;
Bartlett v. Emerson, 7 Gray 144;
Hunnicutt v. Peyton, 102 U. S. 365.
 (3) *Powers v. Silsby*, 41 Vt. 288.

than in America; but in matters of of general or public nature, as boundaries of counties, rights of common, public highways, etc., evidence of this nature may be given in most of the States of this country.

The general rule is undoubted that common reputation is admissible as evidence in in questions of boundary; but there is much diversity as to its proper application.

(I) In a recent Texas case this subject was very ably discussed, and I cannot do better than to quote from the opinion of the learned Judge:- "The unrestricted admission of this species of evidence would be fraught with the most dangerous tendencies, and violate the best dictates of experience. The admissibility, as well as the value and weight, of general reputation depend very much upon the circumstances of the case in which it is offered. It cannot of course be received as to title. It is admissible only as to the loquo in quo of the boundary, a fact of which the community and neighborhood around it is supposed to be peculiarly well informed. The boundary must be an ancient one; and its supposed locality must be of sufficient interest or note in the neighborhood or community to have been

the subject of observation and conversation among the people. The reputation or understanding must be general and concurrent. There, weight of opinion or neighborhood report is not common reputation. The reputation or understanding must have been formed and in existence before the controversy commenced in which it is used as evidence."(1)

A L L U V I O N .

Alluvion, or increase per projectionem vel alluvionem, may be defined as :- "The gradual accumulation of alluvial deposits upon the bank of a river or the shore of the sea". A knowledge of the rules governing this subject is almost indispensable, owing to the important bearing which it has in determining the boundaries of land bordering upon the water. If the accumulations are gradual, the boundary line of lands bordering on such water changes with the increase of alluvial deposits. Angel on Water Courses, says:- (1) "When the change is so gradual as not to be perceived at any one moment of time, the proprietor, whose land is thus increased, is entitled to the addition." (2) The test as to what is gradual and imperceptible

(1) Tucker v. Smith, (Feb. 1887)

(1a) Ang. Water Courses, # 53.

(2) Halsey v. Mc Cormick, 18 N. Y. 149;
New Orleans v. U. S., 10 Pet. 662.

in the sense of the rule is, that "though the winnenses may see from time to time that progress has been made, they cannot preceive it while the process is going on". (1)

Various rules for determining the boundary line of land formed by accretion have been laid down by the courts of this country,; but it is impossible to formulate any single rule which will apply to every particular case. The oldest and perhaps the most widely accepted rule was derived from the civil law, and was first recognized in this country in the case of *Deerfield v. Arms*, (2) and has since been followed in New Hampshire, Rhode Island, New York, Louisiana and the Supreme court of the United States. (2) The rule is thus stated:- "Measure the whole extent of the different riparian proprietors line on the river, and ascertain how many feet each proprietor owned on this line; divide the newly formed river line into equal parts and appropriate to each proprietor as many of these parts as he owned feet on the old line; and then draw lines from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division

(1) *Co. of St. Clair v. Lovington*, 23 Wall. (U. S.) 46.

(2) 17 Pick. 41.

(3) *Batchelder v. Kiniston*, 51 N. H. 496;
O'Donnell v. Kelsey, 10 N. Y. 412;
Banks v. Odgen, 2 Wall. (U. S.) 57;
Jones v. Johnston, 18 How. (U. S.) 150.

on the newly formed shore." The following rule has also been recognized in some jurisdictions:- "Draw a line along the main channel, in the direction of the general course of the current in front of the two estates, and from a line so drawn, and at right angles with it, draw a line to meet the original division line on the shore." (1) In Maine a rule differing from those above given has been adopted; but it has been found to be of little practical importance owing to the great difficulty experienced in the application. In Michigan the rule laid down in the early Massachusetts case has been adopted with some modifications. In a recent case in that State, the the court said:- "It is freely admitted that this rule may require modifications under particular circumstances in order to secure equal justice, and that, in ascertaining the shore line or margin of the water, a general line ought to be taken, and not the actual length of the line on the margin, if it happens to be elongated by deep indentations or sharp projections, so that the line shall embrace the general line of the shore." (2)

Whether the same rule applies to alluvion formed by artificial means is not so clear from the authorities.

(1) Stockman v. Browning, 18 N. J. Eq. 391.

(2) Lumber Co. v. Peters, 87 Mich. 498.

There is a dictum in *Halsey v. Mc Cormick*(1) which would indicate that it does; certainly as against the party causing such erosion and consequent accretion. This law is al so applicable to lands upon an artificial pond. It must be remembered, however, that this rule is not an arbitrary one; and that if from a fair interpretation of the language used in the instrument of conveyance the intention of the parties seems to be to locate the boundary line definitely, it will remain p ermanent and unchangeable though alluvial deposits are subsequently formed. (2)

Reliction may be defined as, "land left uncovered by the receding of the water from its former condition". If the water recedes gradually and insensibly, the land thus exposed belongs to the adjacent owner; but if the increase be sudden the land still, belongs to its former owner, the State or the adjacent riparian proprietor, accordingly as the rule of the civil or common law prevails, subject of course to the modifications already mentioned.(II)

Avulsion is, "where by the immediate and manifest power of the stream soil is taken suddenly from one man's

(I) 18 N. Y. 147.

(2) *Cook v. Mc Clure*, 58 N. Y. 457.

(II) *Land Co. v. Lippincott*, 45 N. J. L. 409.

land and carried to another." (1) If the annexation is caused by some sudden convulsion of nature the result will be the same. In either case the land so removed belongs to the original owners and no change in the boundary line will take place. But according to the old rule, the original owner must not allow such soil to remain upon the adjacent proprietor, until it cemented or coalesced with the soil of the second owner, or else his right to reclaim it would be lost.

I S L A N D S .

After having mastered the general principles already enunciated, relating to boundaries in general, their application to islands will occasion comparatively little difficulty. In those States which have accepted the common law doctrine as to navigable rivers in full, the following rules are applicable:- Islands formed in navigable rivers belong to the State. Islands formed in non-navigable rivers belong to the riparian proprietor. If such island form in the center of the stream, the *filum aquae* or thread of the stream remains the boundary line. Hence, if such island is wholly on one side of the *filum aquae*, it belongs

to the proprietor on whose side it forms. If the island forms partly on each side, then the filum aquae will divide the ownership. Islands thus formed will change the position of the thread of the stream again, and each side of the island will form in its turn a shore line which will throw the thread of the stream midway ^{between} itself and the shore which it faces. There will thus be two rivers, and islands which might arise in either would be divided between the proprietors of the island first formed and the original shore according to analogous principles. Thus, if the island is altogether on one side of the thread of the stream, between the first island and the main shore, it will belong to the owner of the main shore or of the island, according as it is nearer the one or the other. If a river suddenly leaves its bed or becomes dry, title to the soil will remain unchanged. (1) Thus it is that grants of land bordering on the shore of a stream not navigable, include all islands, or parts of islands, between the shore and the center of the stream, unless clearly reserved from the operation of the grant. (2)

(1) Woodbury v. Short, 17 Vt. 387.

(2) Solp v. Hoyt, 44 Ill. 223.

